No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TROY VICTORINO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

CHRISTOPHER J. ANDERSON
Counsel of Record
Law Office of Christopher J. Anderson
2217 Florida Boulevard, Suite A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com

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EXHIBIT 1

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Supreme Court of Florida

No. SC17-1285

TROY VICTORINO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 8, 2018]

PER CURIAM.

Troy Victorino, a prisoner under sentences of death, appeals the portions of the postconviction court's order denying in part his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

I. BACKGROUND

On July 25, 2006, after a jury trial, Victorino was found guilty of the following crimes: one count of conspiracy to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence; six counts of first-degree murder of victims Erin Belanger, Francisco Ayo Roman, Jonathon W.

Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega; one count of abuse of a dead human body with a weapon; one count of armed burglary of a dwelling; and one count of cruelty to animals. After the penalty phase, the jury returned a recommendation that Victorino be sentenced to death for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo Roman (by a vote of ten to two), Jonathon W. Gleason (by a vote of seven to five), and Roberto Manuel Gonzalez (by a vote of nine to three), and to life imprisonment for the murders of Michelle Ann Nathan and Anthony Vega. The trial court followed the jury's recommendation and imposed four death sentences on Victorino.

We affirmed Victorino's convictions and death sentences on direct appeal. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009). We thereafter affirmed the denial of Victorino's initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Victorino v. State*, 127 So. 3d 478 (Fla. 2013).

Following the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), Victorino filed a successive postconviction motion. The postconviction court granted Victorino's motion in part, ordering that Victorino's death sentences be vacated and a new penalty phase be held in light of the *Hurst* and *Mosley* decisions. But the postconviction court denied the portions of

Victorino's motion in which he argued that he was entitled to be resentenced to life imprisonment based on section 775.082(2), Florida Statutes, the prohibition against double jeopardy, and the prohibition against ex post facto laws. Victorino now appeals the portions of the postconviction court's order denying in part his successive motion.

II. ANALYSIS

A. Section 775.082(2), Florida Statutes

Victorino concedes we have already ruled in *Hurst v. State* and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016), that section 775.082(2)[1] does not require death sentences imposed in violation of *Hurst v. Florida* to be commuted to life. Nonetheless, Victorino urges us to reconsider our interpretation of section 775.082(2) in light of the fact that his case involves a mass murder and four death sentences. Victorino asserts that under these circumstances a new penalty phase

1. Section 775.082(2) provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

would be especially time consuming and costly and therefore it would be reasonable for us to construe section 775.082(2) in a way that would require his death sentences to be commuted to life sentences. We find Victorino's suggestion that we reconsider our interpretation of section 755.082(2) based on the facts of his case unpersuasive and conclude that section 775.082(2) does not entitle Victorino to be resentenced to life imprisonment.

B. The Prohibition Against Double Jeopardy

Victorino next argues that because none of the four jury recommendations for the death penalty in his case were unanimous, he was "acquitted" of the death penalty and therefore subjecting him to a new penalty phase, in which he will again be eligible for the death penalty, violates the prohibition against double jeopardy. This claim is meritless. The *Hurst* decisions do not "acquit" Victorino of his four death sentences. As the United States Supreme Court discussed in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003), a retrial of a capital defendant does not implicate double jeopardy, stating, "[n]or, in these circumstances, does the prospect of a second capital-sentencing proceeding implicate any of the 'perils against which the Double Jeopardy Clause seeks to protect' " (citation omitted). Victorino has not been acquitted of the death penalty or deemed to be an inappropriate candidate for the death penalty. The postconviction court correctly applied the law in determining that double jeopardy does not bar a new penalty

phase in which Victorino will again be eligible for the death penalty. Victorino is not entitled to relief.

C. The Prohibition Against Ex Post Facto Laws

Victorino argues that to "apply the recent, post-*Hurst* case law retroactively to make the Defendant death-eligible would violate the constitutional prohibitions against ex post facto laws." Initial Brief of Appellant at 18, *Victorino v. State*, No. SC17-1285 (Fla. Sept. 21, 2017). For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. Thus, it does not constitute an ex post facto law, and Victorino is therefore not entitled to relief.

III. CONCLUSION

For these reasons, we affirm the portions of the postconviction court's order denying Victorino's claims that he is entitled to have his death sentences reduced to life sentences.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Volusia County,
Randell H. Rowe, III, Judge - Case No. 642004CF001378XXXAWS

Christopher J. Anderson of Law Office of Christopher J. Anderson, Neptune Beach, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

EXHIBIT 2

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1285
L.T. CASE NO.: 04-1378-CFAWS

TROY VICTORINO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING

The death-sentenced Appellant, by and through his undersigned, Court-appointed counsel, pursuant to Rule 9.330, Fla. R. App. P., respectfully moves this Court for a rehearing on its March 8, 2018 Opinion denying Appellant's claim that he is entitled to have his death sentences reduced to life sentences. This rehearing motion is made on the grounds that this Court appears to have misapprehended Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) as indicating that there is no double-jeopardy bar to putting Appellant through another life-or-death penalty phase.

Initially, it noted that the present case is a post- Ring v. Arizona, 536 U.S. 584 (2002) and pre-Hurst v. Florida, 136 S. Ct. 616 (2016) case. Appellant's jurors were read the standard penalty-phase jury instructions of the time which directed them to first determine the existence of aggravating circumstances, followed by determining whether the aggravating circumstances considered alone were sufficient to warrant the death penalty, followed by determining the existence of mitigating circumstances, followed by weighing aggravators against mitigators, following by the jury's life-or-death sentence votes for each victim. (direct appeal record Vol. 46, p. 4123 to Vol. 51, 5059). In other words, there was indeed a separate sentencing

proceeding at which the prosecution was required to prove –beyond a reasonable doubt— additional facts in order to justify death sentences.

As further stated by this Florida Supreme Court in its Victorino v. State , 23 So.3d 87, 94 (Fla. 2009) direct-appeal Opinion:

> The jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo-Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three).

Sattazahn is the sole case this Florida Supreme Court cites in support of its March 8, 2018 ruling that the prohibition against double jeopardy does not bar a new penalty phase. However, the facts of Sattazahn are markedly different from the facts of this case in several key respects. Sattazahn was prosecuted on a charge of first-degree murder of a restaurant manager in the State of Pennsylvania. The case progressed to the life-or-death penalty phase. The State presented evidence of a statutory aggravating circumstance and the defense presented evidence of mitigating circumstances.

Under Pennsylvania law, the death penalty is imposed only if the jury unanimously finds one or more aggravating circumstances which outweigh the mitigating circumstances. Pennsylvania law further provides that, in the event the sentencing jury cannot reach a unanimous life-or-death decision, the judge is to discharge the jury and sentence the Defendant to life.

Sattazahn's jurors, after 31 hours of penalty-phase deliberation, gave the judge a note explaining that they were deadlocked 9-3 for a life sentence and did not believe such deadlock would be broken. The trial judge, in accordance with Pennsylvania law, sentenced Sattazahn to life. Sattazahn, supra, at page 104.

On appeal, the Pennsylvania appellate court found some errors in the guilt-phase jury instructions and remanded the case back to the trial court for an entirely new trial, both guilt and penalty phases. The new trial in Sattazahn, included both guilt and penalty phases. The new-trial jury ended up unanimously voting for the death penalty.

The question in Sattazahn was whether the constitutional prohibition against double jeopardy precluded the State from re-seeking the death penalty where the Defendant was granted a new trial based on guilt-phase errors and where the first-trial jury had been unable to reach a unanimous death-sentence decision. The United States Supreme Court held that prohibition against double jeopardy did not bar a new life-or-death penalty phase in this scenario. The U.S. Supreme Court explained that, under Pennsylvania law, the Sattazahn jury was "deadlocked" and had failed to reached reach a finding as to the aggravating circumstance. Hence, the United States Supreme Court explained, the jury could not be said to have "acquitted" Sattazahn of the death penalty. The United States Supreme Court concluded that double-jeopardy protection does not prevent another pursuit of the death penalty such a situation. Sattazahn, supra, at pgs. 109-110.

It is important to note that, under the Pennsylvania life-or-death sentencing procedure described in Sattazahn, there is no provision for non-unanimous life or death sentencing decisions by the jury. It must be either a unanimous death-sentence decision or a unanimous life-sentence decision or the jury is deemed "hung" and the judge sentences the Defendant to life.

The United States Supreme Court explained its Sattazahn rationale: Under Pennsylvania law, the jury's failure to reach a unanimous life-or-death sentencing decision is treated as a "hung" jury Id p. 113 "Normally, a retrial following a hung jury does not violate the Double Jeopardy Clause." Id. p. 109. Justice Scalia, writing for the Court, further explained:

> . . . the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result –or more appropriately, that nonresult—cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence."
>
> (id. p. 110).

However, in Sattazahn, the U.S. Supreme Court distinguished its ruling from its prior, Bullington v. Missouri, 451 U.S. 430 (1981) ruling prohibiting the State from re-seeking the death penalty in as follows:

> In Bullington v. Missouri, 451 U.S. 430 (1981), however, we held that the Double Jeopardy Clause *does* apply to capital-sentencing proceedings where such proceedings "have the hallmarks of the trial on guilt or innocence." *Id.*, at 439. We identified several aspects of Missouri's sentencing proceeding that resembled a trial, including the requirement that the prosecution prove certain statutorily defined facts beyond a reasonable doubt to support a sentence of death. *Id.*, at 428. Such a procedure, we explained, "explicitly requires the jury to determine whether the prosecution has "proved its case." *Id.*, at 444. Since, we concluded, a sentence of life imprisonment signifies that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence," the Double Jeopardy Clause bars a state from seeking the death penalty on retrial. *Id.*, at 445 (Quoting State ex. Rel. Westfall v. Mason, 594 S.W. 2d 908, 922 (Mo. 1980) (Bardgett, C.J., dissenting).
>
> (emphasis Appellant's)

In Sattazahn, the U.S. Supreme Court explained that it is the existence of a separate life-or-death sentencing proceeding in which the State is required to prove the additional facts justifying the death penalty rather than the subsequent imposition of a life sentence that triggers the double-jeopardy bar to a new sentencing proceeding:

> We were, however, careful to emphasize [in Bullington v. Missouri, 451 U.S. 430 (1981)] that it is not the mere imposition of a life sentence that raises a double jeopardy bar. We discussed Stroud, a case in which a defendant who had been convicted of first-degree murder and sentenced to life imprisonment obtained a reversal of his conviction and a new trial when the Solicitor General confessed error. In Stroud, [Stroud v. United States, 251 U.S. 15 (1919)], the Court unanimously held that the Double Jeopardy Clause did not bar imposition of the death penalty at the new trial. What distinguished Bullington from Stroud, we said, was the fact that in Stroud, "there was no separate sentencing proceeding at which the prosecution was required to prove –beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence." Bullington, 451 U.S., at 439. We made clear that an "acquittal" at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections.

In Florida, unlike Pennsylvania, the sentencing jury's failure to reach a unanimous life-or-death sentencing decision was *not* treated as a "hung" jury and did not result in a mistrial. In addition, the Florida death-sentencing procedure in effect in 2006, when Appellant was tried, *did* have the hallmarks of a trial of guilt or innocence. Both sides presented evidence and argument and the jury deliberated and made sentence-related determinations.

The present Appellant's jurors were not "deadlocked." They completed their statutorily defined sentencing duties and successfully completed Florida's then-in-effect sentencing procedure as to all of the victims. Although Appellant's jurors did not issue explicit written findings as to aggravating circumstances, they were instructed to reach conclusions about aggravators and mitigators during deliberation as steps along the way to their ultimate life-or-death sentencing votes. Every indication is that all of the jurors did as instructed.

The present Appellant, unlike Sattazahn, was not granted a new guilt phase.

The United States Supreme Court has made it clear that the fact-finding function of the sentencing jury is more important than its unanimous "life" sentence vote. For example, in Hurst v. Florida, 136 S. Ct. 616 (2016) the Court stated, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation

is not enough." In Ball v. United States, 163 U.S. 662 (1986) the United States Supreme Court ruled that the prohibition against double jeopardy precluded a State from correcting and re-filing a defective indictment to re-try a defendant previously acquitted by a jury of the same murder. In double-jeopardy analysis, substance prevails over form.

In the present case, every indication is that Appellant's jurors followed the then-existing procedure and took all of the steps and made all of the findings required for their ultimate life-or-death sentencing decision. They chose to render non-unanimous votes for the death penalty, which –as a matter of law under Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (2016)— are effectively decisions *against* the death penalty. In this regard, the present Appellant's jurors *can* be regarded as having "acquitted" Appellant of the death penalty.

This Florida Supreme Court does not regard pre-*Hurst* jury sentencing activities as valueless. This Court continues to uphold pre-*Hurst* jury death-sentencing decisions where the State meets its burden of proving the *Hurst* error to be harmless beyond a reasonable doubt. Hurst v. State, 202 So. 3d 40 (Fla. 2016).

WHEREFORE the Appellant respectfully requests that this Florida Supreme Court grant a rehearing on the question of whether the constitutional prohibition against double jeopardy bars re-subjecting Appellant to the risk of receiving the death penalty.

(continued on next page)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Doris Meacham, Assistant Attorney General, representing the State of Florida, through the Florida Courts e-filing portal, and by U.S. Mail to Inmate Troy Victorino, DC# 898405, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083 on March 20, 2018.

Respectfully submitted,

/s/ Christopher J. Anderson

CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar # 0976385
2217 Florida Blvd., Suite A
Neptune Beach, FL 32266
(904) 246-4448
chrisaab1@gmail.com
Court-appointed counsel for Appellant

EXHIBIT 3

Supreme Court of Florida

THURSDAY, MAY 3, 2018

CASE NO.: SC17-1285
Lower Tribunal No(s).:
642004CF001378XXXAWS

TROY VICTORINO vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

DORIS MEACHAM
CHRISTOPHER JAMES ANDERSON
HON. LAURA E. ROTH, CLERK
HON. RANDELL H. ROWE III, JUDGE
ROSEMARY CALHOUN

EXHIBIT 4

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-1285
Lower Tribunal No.: 2004-01378 CFAWS

TROY VICTORINO

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
2217 Florida Boulevard, Suite A
Neptune Beach, FL 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Attorney
for Appellant

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PRELIMINARY STATEMENT

This is an appeal of a partial denial of Appellant's Rule 3.851, Fla. R. Crim. P. Successive Motion for Post-Conviction Relief and for correction of illegal sentences in a death-penalty case. Such motion was brought in the wake of Hurst v. Florida, 577 US. _____,136 S. Ct. 616 (2016) and Hurst v State, 202 So. 3d 40 (Fla. 2016) and appears at Volume 1, pages 77-291 of the Record on Appeal for *this* appeal. For ease of reading, such partially denied successive motion for postconviction relief is referred to simply as the "subject motion." In it, Defendant advanced arguments that his death sentence was illegal in the wake of the Hurst, decisions, *supra.* 2d PCR1, p. 83-88. Defendant also advanced arguments that he cannot again be placed at risk of receiving the death penalty. 2d PCR 1, p. 89-93.

This brief contains references to the record on appeal created in connection with the subject, successive, post-conviction motion proceedings. They are designated by "2d PCR," followed by the applicable record volume number (there is only one Volume), followed by the applicable record page numbers.

The brief also contains references to the record of the original jury trial proceedings. They are designated by the letter "R" followed by the applicable record volume number, followed by the clerk's record-on-appeal page numbers (bottom of page).

Defendant Troy Victorino is referred to primarily as "Defendant, " but sometimes also as "Appellant" or "Victorino." Inasmuch as the subject motion raised only "legal" issues, there was no evidentiary hearing. However, the trial court conducted oral argument. 2d PCR1, p. 52-75. For clarity, such trial court oral argument is referred to as "trial court oral argument."

Following such trial court oral argument, the trial court entered its Order finding Defendant's death sentence to be illegal and granting Defendant a new penalty phase based on the above-cited Hurst decisions. However, the trial court denied the remainder of Defendant's subject motion, which argued that Defendant could not again be placed at risk of receiving the death penalty. 2d PCR1, p. 229-231. Defendant now appeals the trial court's denial of such claims that Defendant can no longer be placed at risk of the death penalty.

STATEMENT OF THE CASE AND FACTS

This Florida Supreme Court set forth the key facts of this case in its original direct-appeal Opinion in Victorino v State, 23 So. 3d 87 (Fla. 2009) as follows:

> On August 27, 2004, Victorino was charged in a fourteen count superseding indictment that included six counts of first degree murder in the deaths of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo Roman. Victorino, with codefendants Jerone Hunter and Michael Salas, went to trial on July 5, 2006. Codefendant Robert Anthony Cannon previously pleaded guilty as charged.
>
> * * *

The evidence presented at trial established that the August 6, 2004, murders were the culmination of events that began several days before. On Friday, July 30, Erin Belanger contacted police concerning suspicious activity at her grandmother's vacant house on Providence Boulevard in Deltona. Without the owner's permission, Victorino and Hunter had recently moved into the home with their belongings. On Saturday, Belanger again contacted police; this time she reported that several items were missing from her grandmother's house.

Late Saturday night, Victorino appeared at Belanger's own residence on Telford Lane. He demanded the return of his belongings, which he believed Belanger had taken from the Providence Boulevard residence. Shortly after leaving Belanger's residence early on the morning of Sunday, August 1, Victorino contacted law enforcement to report the theft of his belongings from the Providence Boulevard residence. The responding officer advised Victorino that he had to provide a list of the stolen property. This angered Victorino, and he said, "I'll take care of this myself."

A short time later, Victorino met Brandon Graham and codefendants Cannon and Salas, who were in Cannon's Ford Expedition (the SUV). Codefendant Hunter and several young women were also in the SUV. Victorino told them that Belanger and the other occupants of the Telford Lane house had stolen his belongings and that he wanted them to go fight Belanger and the others. According to Graham, Victorino and the occupants of the SUV all went in the SUV to the Telford Lane residence. While Victorino remained in the SUV, the young women went into the residence armed with knives. The young men stood outside holding baseball bats, and Hunter yelled for the occupants to come out and fight. The group left in Cannon's SUV, however, after victim Ayo Roman yelled "policia."

A few days later, on the evening of Wednesday, August 4, Victorino went to a park with Graham and the three codefendants to fight another group. Evidence was presented that some of the members of that group were affiliated with the victims at Telford Lane and would have knowledge of Victorino's allegedly stolen property. When their foes failed to show up, Victorino and his associates drove back to a house on Fort Smith Boulevard in Deltona where Victorino and Hunter now lived. As they arrived, however, Victorino spotted the car

of the group with which the fight was planned and directed Cannon, who was driving, to chase the car. Victorino fired a gunshot at the fleeing car and then told Cannon to take him home.

The following morning, Thursday, August 5, Graham, Salas, and Cannon met with Victorino and Hunter at their residence. There, Victorino outlined the following plan to obtain his belongings from Belanger. Victorino said that he had seen a movie named Wonderland in which a group carrying lead pipes ran into a home and beat the occupants to death. Victorino stated that he would do the same thing at the Telford Lane residence. He asked Graham, Salas, and Cannon if they "were down for it" and said to Hunter, "I know you're down for it" because Hunter had belongings stolen as well. All agreed with Victorino's plan. Victorino described the layout of the Telford Lane residence and who would go where. Victorino said that he particularly wanted to "kill Flaco," and told the group, "You got to beat the bitches bad." Graham described Victorino as "calm, coolheaded."
Hunter asked if they should wear masks; Victorino responded, "No, because we're not gonna leave any evidence. We're gonna kill them all."

Victorino and his associates then left in Cannon's SUV to search for bullets for the gun that Victorino fired the previous night. While driving, the group further discussed their plan and decided that each of them needed a change of clothes because their clothes would get bloody. The group dropped Graham off at his friend Kristopher Craddock's house. Graham avoided the group's subsequent calls and did not participate in the murders.

Around midnight on Thursday, August 5, a witness saw Victorino, Salas, Cannon, and Hunter near the murder scene on Telford Lane. Cannon, a State witness, testified that he and Salas went because they were afraid Victorino would kill them if they did not. Cannon further testified that he, Victorino, Hunter, and Salas entered the victims' home on the night of the murders armed with baseball bats.

On the morning of Friday, August 6, a coworker of two of the victims discovered the six bodies at the Belanger residence and called 911. Officers responding to the 911 call arrived to find the six victims in various rooms. The victims had been beaten to death with baseball

bats and had sustained cuts to their throats, most of which were inflicted postmortem. Belanger also sustained postmortem lacerations through her vagina up to the abdominal cavity of her body, which were consistent with having been inflicted by a baseball bat. The medical examiner determined that most of the victims had defensive wounds. The front door had been kicked in with such force that it broke the deadbolt lock and left a footwear impression on the door. Footwear impressions were also recovered from two playing cards, a bed sheet, and a pay stub. All of these impressions were linked to Victorino's Lugz boots. Furthermore, DNA testing linked bloodstains on Victorino's Lugz boots to several of the victims. A dead dachshund, a knife handle, and a bloody knife blade were also recovered from the crime scene.

On Saturday, August 7, the day after the murders were discovered, Victorino was arrested on a probation violation at his residence on Fort Smith Boulevard. Hunter, who was present at the time, complied with the officers' request that he come to the sheriff's office. Once there, Hunter described his role in the murders. That same day, Cannon's SUV was seized. From it, officers recovered a pair of sunglasses containing victim Ayo Roman's fingerprint. In addition, glass fragments found in the vehicle were consistent with glass from a broken lamp at the crime scene.

When questioned by officers, Salas admitted to being at the crime scene on the night of the murders and stated that Cannon drove there with Victorino, Hunter, and Salas. Salas also described his role in the murders and told officers where the bats had been discarded at a retention pond. Based on that information, law enforcement authorities recovered two bats from the pond and two bats from surrounding trees. The two bats recovered from surrounding trees contained DNA material that was linked to at least four of the victims.

At trial, Victorino testified in his defense. He admitted that he believed that Belanger had taken his property from the Providence Boulevard residence. However, he denied meeting Graham, Cannon, or Salas at his residence on August 5, testifying instead that he was at work. He further denied committing the murders and offered an alibi — that he was at a nightclub on the night of the murders. Two friends testified on behalf of Victorino and corroborated his alibi.

> Hunter and Salas also testified in their defense. Each described his role in the murders and corroborated the other testimony and evidence offered at trial, including the evidence of the meeting at which Victorino planned the murders and the agreement to participate. They further testified that Victorino attempted to establish an alibi by making an appearance at the nightclub.
>
> On July 25, 2006, Victorino was convicted of six counts of first-degree murder (Counts II-VII) ; one count of abuse of a dead human body (Count VIII); one count of armed burglary of a dwelling (Count XIII); one count of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (Count I); and one count of cruelty to an animal (Count XIV).

Defendant's jury trial then progressed to the life-or-death penalty phase. Defendant received death sentences for four of victims and life sentences for the remaining two. R51, p. 5051-5059 and R9, p. 1558-1579. None of the jury's death-sentence recommendations were unanimous. The jury recommended death sentences for the murder of victim Erin Belanger by a vote of 10 to 2, for the murder of victim Francisco Ayo Roman by a vote of 10 to 2, for the murder of victim Jonathan Gleason by a vote of 7 to 5, for the murder of victim Roberto Gonzala by a vote of 9 to 3. R51, p. 5051-5059; R9, p 1531-1579.

This Florida Supreme Court affirmed Defendant's judgments and sentences of death on direct appeal. Victorino v State, 23 So. 3d 87 (Fla. 2009). Defendant then filed his initial motion for postconviction relief. The trial court denied such initial motion for postconviction relief in full. It was essentially an "ineffective

assistance of trial counsel" and "prosecutorial misconduct" type of postconviction motion. This Florida Supreme Court affirmed. Victorino v. State, 127 So. 3d 478 (Fla. 2013).

Shortly after the above-cited Hurst rulings, Defendant filed his subject, successive motion for postconviction relief. 2d PCR1, p. 77-201. In it, Defendant argued that such Hurst rulings rendered his death sentences illegal and required the trial court to vacate them. Defendant also argued that, once his death sentences were so vacated, he could not again be put at risk of receiving the death penalty. Id.

The trial court was persuaded by Defendant's argument that his death sentences were illegal and were to be vacated in light of the above-cited Hurst rulings. 2d PCR1, p. 225-229. However, the trial court *denied* the Defendant's related claims that Florida Statutes Section 775.082(2) and the constitutional prohibitions against double jeopardy and ex post facto laws prevent the State from re-subjecting him to the death penalty. 2d PCR1, p. 230-231. It is the trial court's denials of such related claims that the Defendant now challenges in this appeal.

SUMMARY OF ARGUMENT

In its June 14, 2017 order on Defendant's subject, successive postconviction motion (2d PCR1, p. 223-232), the trial court correctly ruled that Defendant's death sentences were illegal and had to be vacated in light of Hurst v. Florida, 136

S. Ct. 616 (2016). However, the trial court erred in denying Defendant's related claims that Florida Statutes Section 775.082(2) and the constitutional prohibitions against double jeopardy and ex post facto laws prevent the State from re-subjecting to the death penalty. 2d PCR1, p. 229-231.

ARGUMENT WITH REGARD TO EACH ISSUE, INCLUDING APPLICABLE APPELLATE STANDARDS OF REVIEW

Issue 1: The trial court erred in denying Defendant's claim that he cannot again be put at risk of receiving the death penalty because Florida Statutes Section 775.082(2) requires that the trial court resentence him to life without parole rather than re-subjecting him to the risk of receiving the death penalty.

Preservation:

Defendant made this claim in detail in his subject motion. 2d PCR1, p. 89-91. Defendant argued that, Florida Statutes Section 775.082(2), which has been continuously in effect in Florida since before the subject murder, states, "In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment . . ." Defendant argued in his subject motion that this entitled him to have his death sentences commuted to life sentences. 2d PCR1, p. 89-91.

Trial Court's denial Order:

The trial court disagreed, citing Hurst v. State, 202 So. 3d. 40 at 66 (Fla. 2016) and Franklin v. State, 209 So. 3d 1241, at 1248 (Fla. 2016), two cases from this Florida Supreme Court which held that Florida Statutes Section 775.802 (2)'s provision for automatically commuting death sentences to life sentence only applies where the death penalty is held to be unconstitutional as a form of criminal punishment,.

Standard of review:

This is a pure question of law. As such, it is subject to the de novo standard of review. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

Legal argument including relevant case law:

Defendant concedes that this Florida Supreme Court did indeed rule in Hurst v. State, 202 So. 3d 40 (Fla. 2016) and in Franklin v State, supra, that Florida Statutes Section 775.082(2) applies to require commuting death sentences to life sentences only where the death penalty *as a form of criminal punishment* is ruled unconstitutional. However, Defendant now asks this reviewing court to revisit the matter and reconsider such rulings in light of the facts of the present mass-murder case.

As indicated in Defendant's subject motion (2d PCR1, p. 81-81) the Defendant was convicted of first-degree murder of six separate victims. Defendant's jurors recommended death sentences for two of the victims by a vote

of 10 to 2 and recommended death sentences for two other victims by votes of 7 to 5 and 9 to 3, respectively. Defendant's jurors recommended sentences of life without parole for the remaining two victims. R51, p. 5051-5059. Put simply, none of the jury's death-sentence recommendations were by unanimous juror vote.

Obviously, every death-penalty case is very time-consuming and expensive. The present Defendant's murder trial involved six separate murder victims and was especially prolonged and costly. Although the trial court granted the Defendant a new penalty phase, most of the guilt-phase evidence will also have to be presented to enable the new sentencing jurors to assess the level of Defendant's culpability as to each individual victim. This case demonstrates the imminent reasonableness of construing Florida Statutes Section 775.082(2) in a way requiring the commutation of death sentences to life sentences where, as has happened with the Hurst decisions, Florida's legal procedure for selecting the death penalty has been declared unconstitutional.

Defendant admits that the preamble to the Laws 1972 c 72-118 Sections 1 and 2, which created Florida Statutes Section 775.082 (2), describes such law as "providing that if the courts declare the death penalty unconstitutional, then those persons to be sentenced or those previously sentenced to death should be sentenced to life without parole." However, the plain language of the statutory text of Florida Statutes Section 775.082(2) begins with the clear and unambiguous phrase, "In the

event the death penalty in a capital felony is held to be unconstitutional in a Florida case . . ."

Holding the death penalty to be unconstitutional in a Florida capital felony case is exactly what the United States Supreme Court and the Florida Supreme Court did in Hurst decisions, *supra*. There is nothing in the statutory text of Florida Statutes Section 775.082(2) which states that such automatic resentencing to life is occur only if the punishment of death is held to be unconstitutional or only if the manner of physically executing the punishment of death is held to be unconstitutional or only if the legal procedure for selecting the penalty of death is held to be unconstitutional . On the contrary, Florida Statutes Section 775.082 unequivocally states that once the death penalty in a capital felony is held to be unconstitutional in a Florida case, Florida death sentences are to be reduced to Florida life sentences. When the text of a statute speaks clearly and without ambiguity, the judiciary's role is to simply apply it. Gomez v. Villa. of Pinecrest, 41 So. 3d 180, 185 (Fla. 2010). The use of the word "shall" is used in Florida Statutes Section 775.082. The use of the word "shall" in a statute is presumptively mandatory. Grip Dev. Inc. v. Caldwell Banker Residential Real Estate, Inc. 788 So. 2d 262, 265 (Fla. 4th DCA 2000). Furthermore the "rule of lenity" dictates that penal statutes are construed in the manner most favorable to the capital defendant. Reino v. State, 352 So. 2d 853, 860 (Fla. 1977). The United States Supreme

Court's ruling in Hurst v. Florida, *supra* and Hurst v. State, *supra* have indeed declared the death penalty in a Florida case to be unconstitutional. This is the triggering event which now immunizes Defendant from the death penalty pursuant under Florida Statutes Section 775.082. The trial court erred in failing to so rule.

Constitutional violations:

Re-subjecting Defendant to the death penalty violates Defendant's rights to due process of law secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violates the prohibitions against double jeopardy contained in in the Fifth and Fourteenth Amendments to the U.S. Constitution and in Article 1, Section 9 of the Florida Constitution. It also violates the prohibitions against ex post facto laws contained in Article 1, Sections 9 and 10 of the U.S. Constitution and in Article 1, Section 10 of the Florida Constitution.

Defendant also refers to and incorporates by reference in support of this Issue all of the facts, evidence, statutes, case law and constitutional authority cited in support of all of the other Issues in this appeal.

Issue 2: The trial court erred in denying Defendant's claim that he cannot again be put at risk of receiving the death penalty because of the prohibitions against double jeopardy contained in 5th and 14th Amendments to the U.S. Constitution and in Article 1, Section 9 of the Florida Constitution

Preservation:

The Defendant asserted in his subject motion that, given the vacating of his death sentences pursuant to the above-cited Hurst decisions, constitutional prohibitions against double jeopardy now prevent the State from re-subjecting Defendant to the death penalty. 2d PCR1, p. 91-92. The Defendant argued that, under both the Florida and United States Constitutions and the case law, once a judge or jury determines that a Defendant is not an appropriate candidate for the death penalty (also known as being "acquitted" of the death penalty) that Defendant cannot again be put at risk of receiving the death penalty. 2d PCR1, p. 91-92.

Trial court denial order:

The trial court denied this claim. 2d PCR1, p. 230. The trial court ruled that Defendant's jurors rendered mere death-sentence recommendations rather than the type of "acquittals" of the death penalty that would create a double-jeopardy bar to further pursuit of the death penalty. 2d PCR1, p. 230.

Standard of review:

This is a pure question of law. As such, it is subject to the de novo standard of review. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

Legal argument including relevant case law:

Now that the United States Supreme Court and Florida Supreme Court have rendered their above-cited Hurst decisions invalidating Defendant's September 21, 2006 death sentences, the Defendant cannot again be put through another legal procedure, which again puts him at risk of receiving the death penalty. This is so because of the U.S. and Florida Constitutions' prohibitions against double jeopardy.

The Florida Supreme Court has consistently ruled that once a Florida judge or jury deems a defendant an inappropriate candidate for the death penalty, that Defendant cannot again be put at risk of receiving the death penalty. Brown v. State, 521 So.2d 110 (Fla. 1988) cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); Fasenmyer v. State, 457 So.2d 1361 (Fla.1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1407, 84 L.Ed.2d 796 (1985); and Troupe v. Rowe, 283 So.2d 857 (Fla.1973), The Justices have concluded that the double jeopardy clause contained in the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibit a second pursuit of the death penalty once a Defendant successfully avoids it. The United States Supreme Court has also so ruled. Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270

(1981); and United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

Once a Defendant is "acquitted of the death penalty" by a trier of fact, he or she may not again be subjected to risk of the death penalty. Preston v. State, 607 So. 2d 404 (Fla. 1992). In Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v State, (Florida Supreme Court Case No. SC12-1947, Oct. 14, 2016) and McGirth v. Jones (Florida Supreme Court Case No. SC15-953, Jan. 27, 2017), this Florida Supreme Court has clarified that anything short of a *unanimous* jury death-sentence decision is insufficient for the death penalty.

Wright v. State, 586 So. 2d 1024, 1033 (Fla. 1991) dealt with a trial judge's "override" of a jury life-sentence recommendation. This Florida Supreme Court found such judge's override of the jury's life sentence recommendation was erroneous. This Florida Supreme Court explained, "Thus, when it is determined on appeal that the trial court should have accepted the jury's recommendation of life imprisonment . . . the defendant must be deemed acquitted of the death penalty for double jeopardy purposes.

Green v. United States, 355 U.S. 184 (1957) concerned a Defendant who was charged with first-degree murder but whose jury convicted him only of the lesser included offense of second-degree murder. Green got such second-degree murder conviction overturned on appeal for lack of sufficient evidence. On retrial,

the State again tried the Defendant for first-degree murder, over Defendant's "double jeopardy" objection. This time the State succeeded in getting the jury to convict the Defendant of first-degree murder. The United States Supreme Court reversed such first-degree murder conviction, explaining that the jury's refusal to convict the defendant of first-degree murder in the first trial acquitted Green of first-degree murder such that double jeopardy prevented Green from again being retried on such first-degree murder charge.

In Fong Foo v United States, 367 U.S. 141 (1962) a federal circuit court of appeal held that the federal district (trial) court erred in directing a verdict for the Defendant and then subsequently entering a judgment of acquittal. The United States government, over the Defendant's objection, re-tried the Defendant a second time and secured the conviction. The United States Supreme Court reversed, explaining that once a Defendant has been acquitted --rightfully or wrongfully-- double jeopardy bars retrial of such Defendant on the same charge.

As noted in the Statement of the Case and Facts above, none of Defendant's jury death-sentence votes were unanimous. This Florida Supreme Court has ruled that anything short of complete jury unanimity in the entire death-sentencing process and the ultimate death-sentencing decision is insufficient for the death penalty. Hurst v. State, 202 So. 3d 40 (Fla. 2016); McGirth v. State, (Fla. Sup. Ct Case No. SC15-953, Jan 26, 2017). All of the present Defendant's death-sentence

jury death-sentence votes were non-unanimous and thus acquitted Defendant of the death penalty. The trial court erred in failing to so rule.

Constitutional Violations:

In subjecting the Defendant to the risk of the death penalty a second time, the trial court erred and violated the prohibition against double jeopardy secured the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 9 of the Florida Constitution.

Defendant also refers to and incorporates by reference in support of this Issue all of the facts, evidence, statutes, case law and constitutional authority cited in support of all of the other Issues in this appeal.

Issue 3: The trial court erred in denying Defendant's claim that he cannot again be put at risk of receiving the death penalty because of the prohibitions against ex post facto laws contained in Article 1, Sections 9 and 10 of the U.S. Constitution and in Article 1, Section 10 of the Florida Constitution

Preservation:

Defendant argued in his subject motion that the prohibitions against ex post facto laws contained in Article 1, Sections 9 and 10 of the United States Constitution and in Article 1, Section 10 of the Florida Constitution prevent the State from again placing him at risk of the death penalty. 2d PCR1, p. 92-93.

Trial court denial order:

The trial court, citing State v. Perry, 192 So. 3d 70, 75 (Fla. 5th DCA 2016), *review granted,* SC16-547, 2016 WL 1399241 (Fla. April 6, 2016) and *certified*

question answered, 41 Fla. L. Weekly S449 (Fla., Oct 14, 2106) denied this claim. The trial court stated, "The application of the new capital sentencing statutes did not constitute an ex post facto violation because it is merely a procedural change and does not alter the punishment attached to first-degree murder."

Standard of review:

This is a pure question of law. As such, it is subject to the de novo standard of review. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

Legal argument including relevant case law:

Defendant's status at the time of his original September 26, 2006 sentencing was that of a person who had not received a single, unanimous jury death-sentence recommendation. Hence, the Defendant had (and has) the status of a person not eligible for the death penalty. To go back now and apply the recent, post-*Hurst* case law retroactively to make the Defendant death-eligible would violate the constitutional prohibitions against ex post facto laws.

In Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216 (1925) Justice Stone summarized the characteristics of an ex post facto law: "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with

crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

In the present case, going forward with a new life-or-death sentencing proceeding after the above-cited Hurst rulings would deprive Defendant of the immunity from the death penalty which he now has by virtue of the same Hurst decisions and Florida Statutes Section 775.082 and as a result of having already gone through one life-or-death sentencing proceeding without a single, unanimous jury death-sentence vote. As noted above, Florida Statutes Section 775.082 was in effect at the time of the subject murder. It provides that death sentences that are subsequently determined to be unconstitutional are to be reduced to life-without-parole sentences.

Constitutional violations:

In subjecting the Defendant to the risk of the death penalty a second time under current death-sentencing law, the trial court erred and violated the prohibitions against ex post facto laws contained in Article I, Section 10 of the Florida Constitution and in Article 1, Sections 9 and 10 of the U.S. Constitution.

Defendant also refers to and incorporates by reference in support of this Issue all of the facts, evidence, statutes, case law and constitutional authority cited in support of all of the other Issues in this appeal.

CONCLUSION

For all of the reasons given above, the trial court erred in subjecting the Defendant to a new penalty phase for the first-degree murders of victims Erin Belanger, Francisco Ayo Roman, Jonathan Gleason and Robert Gonzala. The trial court should have automatically reduced Defendant's death sentences for these four victims down to the only other possible sentence: life without the possibility of parole. Defendant respectfully requests that this reviewing court enter its Opinion and Order directing the trial court to so resentence the Defendant to life without parole instead of the death penalty for the murders of these victims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court E-Filing Portal system which will send notice of electronic filing to Rosemary L. Calhoun, Assistant State Attorney, and to Arthur Christian Miller, Assistant Attorney General.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
cbrsaab1@gmail.com
Court-Appointed Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
chrisanbl@gmail.com
Court-Appointed Counsel for Appellant

EXHIBIT 5

IN THE SUPREME COURT OF FLORIDA

TROY VICTORINO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC17-1285

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 728071
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
CapApp@MyFloridaLegal.com
(386) 238-4990
(386) 226-0457 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, Troy Victorino, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

FACTS AND PROCEDURAL BACKGROUND

On August 27, 2004, Troy Victorino was charged in a fourteen-count superseding indictment that included six counts of first-degree murder in the deaths of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo–Roman. *Victorino v. State*, 23 So. 3d 87, 91 (Fla. 2009).

The trial testimony revealed the following:

> The evidence presented at trial established that the August 6, 2004, murders were the culmination of events that began several days before. On Friday, July 30, Erin Belanger contacted police concerning suspicious activity at her grandmother's vacant house on Providence Boulevard in Deltona. Without the owner's permission, Victorino and Hunter had recently moved into the home with their belongings. On Saturday, Belanger again contacted police; this time she reported that several items were missing from her grandmother's house.
>
> Late Saturday night, Victorino appeared at Belanger's own residence on Telford Lane. He demanded the return of his belongings, which he believed Belanger had taken from the Providence Boulevard residence. Shortly after leaving Belanger's residence early on the morning of Sunday, August 1, Victorino contacted law enforcement to report the theft of his belongings from the Providence Boulevard residence. The

responding officer advised Victorino that he had to provide a list of the stolen property. This angered Victorino, and he said, "I'll take care of this myself."

A short time later, Victorino met Brandon Graham and codefendants Cannon and Salas, who were in Cannon's Ford Expedition (the SUV). Codefendant Hunter and several young women were also in the SUV. Victorino told them that Belanger and the other occupants of the Telford Lane house had stolen his belongings and that he wanted them to go fight Belanger and the others. According to Graham, Victorino and the occupants of the SUV all went in the SUV to the Telford Lane residence. While Victorino remained in the SUV, the young women went into the residence armed with knives. The young men stood outside holding baseball bats, and Hunter yelled for the occupants to come out and fight. The group left in Cannon's SUV, however, after victim Ayo–Roman yelled "policia."

A few days later, on the evening of Wednesday, August 4, Victorino went to a park with Graham and the three codefendants to fight another group. Evidence was presented that some of the members of that group were affiliated with the victims at Telford Lane and would have knowledge of Victorino's allegedly stolen property. When their foes failed to show up, Victorino and his associates drove back to a house on Fort Smith Boulevard in Deltona where Victorino and Hunter now lived. As they arrived, however, Victorino spotted the car of the group with which the fight was planned and directed Cannon, who was driving, to chase the car. Victorino fired a gunshot at the fleeing car and then told Cannon to take him home.

The following morning, Thursday, August 5, Graham, Salas, and Cannon met with Victorino and Hunter at their residence. There, Victorino outlined the following plan to obtain his belongings from Belanger. Victorino said that he had seen a movie named Wonderland in which a group carrying lead pipes ran into a home and beat the occupants to death. Victorino stated that he would do the same thing at the Telford Lane residence. He asked Graham, Salas, and Cannon if they "were down for it" and said to Hunter, "I know you're down for it" because Hunter had belongings stolen as well. All agreed with Victorino's plan. Victorino described the layout of the Telford Lane residence and who would go where. Victorino said that he particularly

wanted to "kill Flaco," and told the group, "You got to beat the bitches bad." Graham described Victorino as "calm, cool-headed." Hunter asked if they should wear masks; Victorino responded, "No, because we're not gonna leave any evidence. We're gonna kill them all."

Victorino and his associates then left in Cannon's SUV to search for bullets for the gun that Victorino fired the previous night. While driving, the group further discussed their plan and decided that each of them needed a change of clothes because their clothes would get bloody. The group dropped Graham off at his friend Kristopher Craddock's house. Graham avoided the group's subsequent calls and did not participate in the murders.

Around midnight on Thursday, August 5, a witness saw Victorino, Salas, Cannon, and Hunter near the murder scene on Telford Lane. Cannon, a State witness, testified that he and Salas went because they were afraid Victorino would kill them if they did not. Cannon further testified that he, Victorino, Hunter, and Salas entered the victims' home on the night of the murders armed with baseball bats.

On the morning of Friday, August 6, a coworker of two of the victims discovered the six bodies at the Belanger residence and called 911. Officers responding to the 911 call arrived to find the six victims in various rooms. The victims had been beaten to death with baseball bats and had sustained cuts to their throats, most of which were inflicted postmortem. Belanger also sustained postmortem lacerations through her vagina up to the abdominal cavity of her body, which were consistent with having been inflicted by a baseball bat. The medical examiner determined that most of the victims had defensive wounds. The front door had been kicked in with such force that it broke the deadbolt lock and left a footwear impression on the door. Footwear impressions were also recovered from two playing cards, a bed sheet, and a pay stub. All of these impressions were linked to Victorino's Lugz boots. Furthermore, DNA testing linked bloodstains on Victorino's Lugz boots to several of the victims. A dead dachshund, a knife handle, and a bloody knife blade were also recovered from the crime scene.

On Saturday, August 7, the day after the murders were discovered, Victorino was arrested on a probation violation at his residence on Fort Smith Boulevard. Hunter, who was present at the time, complied with

the officers' request that he come to the sheriff's office. Once there, Hunter described his role in the murders. That same day, Cannon's SUV was seized. From it, officers recovered a pair of sunglasses containing victim Ayo–Roman's fingerprint. In addition, glass fragments found in the vehicle were consistent with glass from a broken lamp at the crime scene.

When questioned by officers, Salas admitted to being at the crime scene on the night of the murders and stated that Cannon drove there with Victorino, Hunter, and Salas. Salas also described his role in the murders and told officers where the bats had been discarded at a retention pond. Based on that information, law enforcement authorities recovered two bats from the pond and two bats from surrounding trees. The two bats recovered from surrounding trees contained DNA material that was linked to at least four of the victims.

At trial, Victorino testified in his defense. He admitted that he believed that Belanger had taken his property from the Providence Boulevard residence. However, he denied meeting Graham, Cannon, or Salas at his residence on August 5, testifying instead that he was at work. He further denied committing the murders and offered an alibi—that he was at a nightclub on the night of the murders. Two friends testified on behalf of Victorino and corroborated his alibi.

Hunter and Salas also testified in their defense. Each described his role in the murders and corroborated the other testimony and evidence offered at trial, including the evidence of the meeting at which Victorino planned the murders and the agreement to participate. They further testified that Victorino attempted to establish an alibi by making an appearance at the nightclub.

On July 25, 2006, Victorino was convicted of six counts of first-degree murder (Counts II–VII); one count of abuse of a dead human body (Count VIII); one count of armed burglary of a dwelling (Count XIII); one count of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (Count I); and one count of cruelty to an animal (Count XIV).

Id. at 91-3.

Following the convictions, the State introduced victim impact statements by the victims' family members after which the defendant presented several witnesses. *Id.* at 93. Victorino began by presenting the testimony of three expert witnesses. Dr. Joseph Wu, a psychiatrist, who concluded that a PET scan revealed Victorino's brain was abnormal and that the scan was consistent with traumatic brain injury or mental health conditions, such as bipolar disorder or schizophrenia. *Id.*

After reviewing Victorino's records and conducting numerous tests, Dr. Charles Golden, a neuropsychologist, determined that Victorino had some frontal lobe impairment and severe emotional problems. *Id* at 93-4. The third defense expert, Dr. Jeffrey Danziger, a psychiatrist, testified that Victorino had an IQ of 101 and outlined Victorino's long history of physical and emotional abuse by his father, an incident of sexual abuse, his history of mental health problems (including his several suicide attempts), and his time in prison. *Id.* at 94.

Several relatives and friends also testified. Victorino's brother and mother also told of Victorino's mental health problems, an instance of sexual abuse, and the frequent physical abuse by his father. In addition, two friends testified about their regard for him. *Id.*

In rebuttal, the State presented Dr. Lawrence Holder, an expert in radiology and nuclear medicine. *Id.* He testified that Victorino's PET scan was normal. Further, he stated that use of a PET scan to suggest that a patient has a specific mental health problem, such as bipolar disorder, is not an established clinical use of such scans. *Id.*

The jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo–Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three). *Id.*

At the subsequently held *Spencer*[1] hearing, the State submitted an additional written victim impact statement. *Id.* Victorino did not present any additional evidence.

The trial court followed the jury's recommendation by imposing four death sentences. *Id.*

> The trial court found the following five aggravating factors applicable to each of the four murders and accorded them the weight indicated: (1) the defendant had a prior felony conviction and was on probation at the time of the murders (moderate weight); (2) the defendant had other capital felony convictions (very substantial weight); (3) the defendant committed the murders in the course of a burglary (moderate weight); (4) the murders were especially heinous, atrocious, or cruel (HAC) (very substantial weight); and (5) the murders were cold, calculated, and premeditated (CCP) (great weight). In addition, the court found a sixth aggravator in the murders of Gleason and Gonzalez—that the murders were committed to avoid arrest (substantial weight). The trial court found no statutory mitigation but did find the following nonstatutory mitigating factors: (1) Victorino had a history of mental illness (some weight); (2) he suffered childhood physical, sexual, and emotional abuse (moderate weight); (3) he was a devoted family member with family support (little weight); (4) he did some good deeds (very little weight); (5) he exhibited good behavior at trial (very little weight); (6) he was a good inmate (little weight); (7) he was a good student who earned awards (little weight); (8) he had an alcohol abuse problem (very little weight); and (9) he had a useful occupation (very

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

> little weight). The trial court determined that the aggravating factors far outweighed the mitigating circumstances and, in accord with the jury's recommendation, sentenced Victorino to death for each of the four murders.

Victorino, 23 So. 3d at 94-5 (footnotes omitted).

The conviction and death sentences were affirmed on direct appeal. *Id.* at 108. Victorino's case became final on direct appeal on March 1, 2010, when the petition for writ of certiorari would have been due to the United States Supreme Court. *See Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires"); *Penry v. Texas*, 515 U.S. 1304, 1304-5 (1995) ("[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, ... shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment," Rule 13.1").

Victorino filed an amended motion for postconviction relief in August 2011, asserting 17 claims. *Victorino v. State*, 127 So. 3d 478, 485 (Fla. 2013). One of the claims alleged that the trial court erred in failing to find that his death sentences are illegal under *Ring v. Arizona*, 536 U.S. 584 (2002). *Victorino*, 127 So. 3d at 485. An evidentiary hearing was held and the postconviction court issued an amended order in February 2012 denying relief. *Id.* This Court affirmed the denial on October 10, 2013, and denied the Appellant's petition for writ of habeas corpus. *Id.* at 503.

On January 12, 2016, the United States Supreme Court ruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's sentencing scheme, which permitted the judge alone to find the existence of an aggravating circumstance, is unconstitutional under the Sixth Amendment of the United States Constitution. *Id.* at 624. In October 2016, this Court ruled in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), that the Sixth Amendment required all of the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. *Hurst*, 202 So. 3d at 44. The specific findings include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. *Id.* The *Hurst* decision also included a holding that, under the Eighth Amendment of the United States Constitution, the jury's recommended sentence of death must be unanimous for the trial court to impose a sentence of death. *Id.*

In December 2016, this Court, in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), addressed the issue of retroactivity for cases that became final after the ruling in *Ring*. This Court determined that defendants whose sentence was final after *Ring* fell into the category of defendants who should receive *Hurst* relief.

On December 28, 2016, Appellant filed a successive postconviction motion based upon *Hurst*. The trial court granted in part and denied in part the successive

motion. (R223-232). The trial court ruled that *Hurst* applied to Victorino's case because it became final after *Ring*, and that the *Hurst* error was not harmless beyond a reasonable doubt because the jury recommendations for the death penalty were not unanimous. (R229). The trial court denied Victorino's argument that he was entitled to be resentenced to life in prison, as well as his arguments regarding double jeopardy and *ex post facto* laws. (R229-231). The trial court vacated Victorino's death sentences and ordered that new penalty phase proceedings be held. (R231).

SUMMARY OF THE ARGUMENT

The Appellant is not entitled to be resentenced to life in prison in accordance with Section 775.082(2), Florida Statutes, based upon the *Hurst* ruling or any subsequent rulings. Furthermore, neither double jeopardy nor *ex post facto* laws prevent Appellant from being sentenced to death.

STANDARD OF REVIEW

Each of the issues presented by Appellant involves a legal question subject to *de novo* review. The factual findings made by the trial court should be accepted where supported by substantial, competent evidence to guide the *de novo* review. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED VICTORINO'S CLAIM THAT HE IS ENTITLED TO A LIFE SENTENCE.

Appellant concedes in his *Initial Brief* that this Court has previously ruled that

Section 775.082(2), Florida Statutes, "applies to require commuting death sentences to life sentences only where the death penalty *as a form of criminal punishment* is ruled unconstitutional." (*I.B.* at 9, emphasis in original). Victorino cites to *Hurst* and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016). Nonetheless, Appellant asks this Court to revisit the issue although he gives no legal basis for doing so. Appellant references the plain language of the statute and the rule of lenity. (*I.B.* at 10-11). However, neither a plain reading of § 775.082 (2) nor the rule of lenity supports Appellant's argument.

Section 775.082 states the following:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

§ 775.082 (2), Fla. Stat. (2017).

Appellant argues that "[h]olding the death penalty to be unconstitutional in a Florida capital felony case is exactly what the United States Supreme Court and the Florida Supreme Court did in *Hurst* decisions." (*I.B.* at 11). This is factually incorrect and Appellant fails to cite to any part of either *Hurst* decision to support his argument. Neither the Supreme Court of the United States nor this Court

declared the state's death penalty statute to be unconstitutional.

Rather, the United States Supreme Court ruled in *Hurst* that Florida's sentencing scheme, not the statute itself, was unconstitutional. Any argument to the contrary goes beyond the holding of *Hurst*. The Supreme Court simply held that the Sixth Amendment was violated under the sentencing procedures if the trial court made factual findings that were not supported by a jury verdict.

In addition, this Court did not declare that the statute was unconstitutional and has rejected arguments that defendants are entitled to an automatic life sentence based upon *Hurst v. Florida*. In *Hurst v. State*, this Court noted that:

> *Hurst v. Florida* was decided on Sixth Amendment grounds and nothing in that decision suggests a broad indictment of the imposition of the death penalty generally. *Ring* was also decided on Sixth Amendment grounds, and that decision did not require the state court to vacate all death sentences and enter sentences of life and did not address the range of conduct that a state may criminalize. After *Hurst v. Florida*, the death penalty still remains the ultimate punishment in Florida, although the Supreme Court has now required that all the critical findings necessary for imposition of the death penalty be transferred to the jury.
>
> There is no indication in the *Hurst v. Florida* decision that the Supreme Court intended or even anticipated that all death sentences in Florida would be commuted to life, or that death as a penalty is categorically prohibited. Moreover, the text of section 775.082(2) refers to the occasion that "the death penalty" is held to be unconstitutional to determine when, and if, automatic sentences of life must be imposed. This provision is intended to provide a "fail safe" sentencing option in the event that "the death penalty"—as a penalty—is declared categorically unconstitutional.

> The Supreme Court in *Hurst v. Florida* focused its decision on that portion of the capital sentencing process requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty. The Court did not declare the death penalty unconstitutional. Accordingly, we hold that section 775.082(2) does not require commutation to life under the holding of *Hurst v. Florida*, which did not invalidate death as a penalty, but invalidated only that portion of the process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death.

Hurst v. State, 202 So. 3d at 65-6 (footnotes omitted). *See also Perry*, 210 So. 3d at 633 (explaining that *Hurst v. State* did not declare the death penalty unconstitutional); *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016) (rejecting Johnson's argument that his case should be remanded to the trial court for imposition of a life sentence).

Accordingly, § 775.082 (2) does not apply and, subsequently, neither does the rule of lenity. Appellant is not entitled to an automatic life sentence.

Furthermore, Victorino's arguments that subjecting him to the death penalty violates the federal and state constitutions are also meritless. He provides no legal support for these arguments.

This claim must be denied.

II. THE TRIAL COURT CORRECTLY DENIED VICTORINO'S DOUBLE JEOPARDY ARGUMENT.

Appellant argues because his death sentence was vacated because of the *Hurst* decisions that the Florida and United States Constitutions prohibit him from being

subjected to the death penalty again because of double jeopardy. (*I.B.* at 13). This argument has no merit.

Victorino confuses a remand for retrial or resentencing with an acquittal in his argument pertaining to double jeopardy. *Hurst* does not "acquit" Victorino of his six (6) murder convictions and does not "acquit" or "commute" him of his four (4) sentences of death. As the United States Supreme Court discussed in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003), a retrial of a capital defendant does not implicate double jeopardy, stating, "[n]or, in these circumstances, does the prospect of a second capital-sentencing proceeding implicate any of the perils against which the Double Jeopardy Clause seeks to protect." (internal quotations omitted). *See also Trotter v. State*, 825 So. 2d 362, 367-8 (Fla. 2002) ("[T]he original sentence must necessarily be vacated . . . [and] double jeopardy principles are not violated ... on resentencing . . . .")

Appellant's argument that the "Florida Supreme Court has consistently ruled that once a Florida judge or jury deems a defendant an inappropriate candidate for the death penalty, that Defendant cannot again be put at risk of receiving the death penalty," has no relevance here. (*I.B.* at 14). Victorino has not been found an inappropriate candidate for the death penalty. The fact that he was convicted of six counts of first degree murder in a case in which the State is seeking the death penalty makes him eligible for the death penalty. None of the cases cited by Appellant prove

otherwise.

In addition, each of Victorino's cases are distinguishable. In *Brown v. State*, 521 So. 2d 110 (Fla. 1988), the trial court erroneously ruled that *Enmund v. State*, 458 U.S. 782 (1982) barred the imposition of the death penalty in the case. *Brown*, 521 So. 2d at 111-2. No such ruling has taken place in the instant case. In *Fasenmyer v. State*, 457 So. 2d 1361 (Fla. 1984), which did not involve the death penalty, the trial court increased the severity of the defendant's sentence following a successful appeal. *Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973), also a non-death penalty case, involved a prosecutor trying to increase a defendant's sentence after the defendant had been sentenced and jeopardy attached. Because Victorino was previously sentenced to death, which is the most severe punishment any defendant can receive, a new penalty phase would not increase the severity of his sentence. Thus, *Fasenmyer* and *Troupe* do not apply here.

Wright v. State, 586 So. 2d 1024 (Fla. 1994), involved a trial judge's override of a jury's recommendation for a life sentence. In contrast, Appellant's trial court followed the jury's recommendation by imposing four death sentences. The jury's two life sentence recommendations stood and no jury override took place. As a result, *Wright* is not applicable.

Contrary to Victorino's arguments on pages 16 and 17 of the *Initial Brief*, the fact that his jury recommendations for the death penalty were not unanimous does

not acquit him of the death penalty. No double jeopardy violation occurred. This claim must be denied.

III. THE TRIAL COURT CORRECTLY RULED THAT *EX POST FACTO* LAWS DO NOT PROHIBIT VICTORINO FROM FACING THE DEATH PENALTY.

Finally, Appellant argues that *ex post facto* laws prevent the State from again placing him at risk of the death penalty. (*I.B.* at 17). This argument is meritless.

The United States Supreme Court has summarized the characteristics of an *ex post facto* law as follows:

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925).

In *Dobbert v. Florida*, 432 U. S. 282 (1977), the Supreme Court ruled that even a procedural change that may work to the disadvantage of the defendant is not *ex post facto*. *Id.* at 293. There, the defendant committed first degree murders in 1971 and 1972. The procedures used in Florida's then-existing Capital Sentencing Statute were found unconstitutional in June of 1972, and the revised Capital Sentencing Statute was enacted in late 1972, after the commission of Dobbert's last murder. Not only were *ex post facto* challenges to the application of the revised Statute to Dobbert rejected by the United States Supreme Court, but the Court

emphasized the "operative fact" of the existence of the prior Death Penalty Statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. *Id.* at 298. The existence of the statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent, i.e., that the Florida Legislature intended that a sentence of death be a viable option in that case. Significantly, the *Dobbert* Court expressly concluded that the revised procedures implemented by the Florida Legislature did not violate the rule forbidding application of *ex post facto* laws, as the changes effected were merely a matter of procedure.

A new penalty phase proceeding does nothing to criminalize behavior that was not criminalized when Victorino was originally tried, and *ex post facto* laws simply do not apply. The Florida Supreme Court has held that the state constitutional provision against *ex post facto* laws applies if a law "(a) ... is retrospective in effect; and (b) ... diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense." *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991).

Victorino fails to articulate any law that would be erroneously applied retrospectively or even any aggravating circumstance that the State would be seeking in a new penalty phase proceeding that was not sought in his original proceeding. Victorino was granted no "immunity" from the death penalty and is not a member

of any protected class for which the death penalty cannot be sought. There is no "increased risk of increasing the measure of punishment attached to the covered crimes" in resentencing a capital defendant who has an original sentence of death vacated and is resentenced under *Hurst*, a case that is far more beneficial to capital defendants. *Ex post facto* considerations simply do not apply, and this claim must be denied.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: Christopher Anderson, chrisaab1@gmail.com, 2217 Florida Blvd., Suite A, Neptune Beach, Florida 32266, the attorney for the Appellant.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Vivian Singleton

VIVIAN SINGLETON

ASSISTANT ATTORNEY GENERAL
Florida Bar No. 728071
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
CapApp@MyFloridaLegal.com
(386) 238-4990
(386) 226-0457 (FAX)

EXHIBIT 6

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-1285
Lower Tribunal No.: 2004-01378 CFAWS

TROY VICTORINO

Appellant,

v.

STATE OF FLORIDA

Appellee. _____

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
2217 Florida Boulevard, Suite A
Neptune Beach, FL 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Attorney
for Appellant

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1. Response and rebuttal to Appellee's argument that Florida Statutes Section 775.082(2) allows the trial court to re-subject Appellant to the risk of receiving the death penalty

§ 775.082(2), Fla.Stat. (2017) provides:

> In the event the death penalty *in a capital case* is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

(emphasis Appellant's)

At page 10 of its Answer Brief, Appellee disagrees with Appellant's assertion at page 11 of Appellant's Initial Brief, that the United States Supreme Court and the Florida Supreme Court held " . . . the death penalty to be unconstitutional in a Florida capital felony case . . in Hurst v. Florida, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016)."

In Hurst v. Florida, Justice Sotomayor, writing for the court, wrote, "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

In other words, the United States Supreme Court did hold the death penalty to be unconstitutional in a Florida capital felony case. It did so in Timothy Lee Hurst's Florida capital felony case.

The Appellee's Answer Brief seems to assume that the phrase, "in a capital case" in Florida Statutes Section 775.082(2) has no meaning and can simply be ignored. However, the legislature's did decide to include the phrase "in a capital case" in Florida Statutes Section 775.082(2) and it cannot ignored for the following reasons: First, by including the words "in a capital case," the Florida legislature was obviously referring to *Florida* capital cases, as opposed to, for example, Arkansas capital cases or Georgia capital cases or California capital cases or federal capital cases or military courts martial capital cases.

As reported by the Death Penalty Information Center (deathpenaltyinfo.org) Arkansas and California and the federal government all include treason as a capital felony. Florida does not. Aircraft hijacking is a capital felony in Georgia, not Florida. So, what is a "capital case" in one jurisdiction is not necessarily a "capital case" in another.

Secondly, the legal mechanism for determining which capital-case Defendants get the death penalty varies from State-to-State. *See*, State v. Steele, 921 So.2d 538 (Fla., 2005), footnotes 3 and 5. Given this, it would not make sense to conclude that the Florida Legislature wanted Florida death sentences

automatically commuted to life if the U.S. Supreme Court were to hold the death penalty unconstitutional in a Georgia aircraft-hijacking case. Clearly, the Florida Legislature was addressing its own, Florida death-penalty laws when it enacted this legislation automatically commuting death sentences to life sentences where " . . the death penalty *in a capital case* is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court . . ."

Under Florida case law, a "capital case" is one which involves a crime punishable by death. Floridians' right to a full, 12-person, "capital case" jury, established by Article 1, Sections 16 and 22 of the Florida Constitution, and by Florida Statutes Section 913.10 (and by the Sixth Amendment to the U.S. Constitution) applies to crimes punishable by death. Hall v. State, 853 So. 2d 546 (Fla. 1st DCA 2003), Walling v State, 105 So. 3d 660 (Fla. 1st DCA, 2013), State v. Hogan, 451 So. 2d 844 (Fla. 1984).

There are three different ways in which the death penalty in a Florida capital felony can be held unconstitutional. (1) One way, as Appellee points out at page 10 of Appellee's Answer Brief, would be the U.S. or Florida Supreme Court to declare death unconstitutional as a form of criminal punishment. (2) A second way would be for the U.S. or Florida Supreme Court to rule that Florida's manner of inflicting the death penalty --i.e. lethal injection—is unconstitutional. (3) The third way –as occurred in Hurst v. Florida, 136 S. Ct. 616 193 L. Ed. 2d 504 (2016) and

Hurst v. State, 202 So. 3d 40 (2016)—is for the U.S. or Florida Supreme Court to rule unconstitutional Florida's method of determining which capital-case defendants get the death penalty and which do not.

At pages 11 and 12 of Appellee's Answer Brief, Appellee argues that the only way the death penalty can be held unconstitutional in a Florida capital felony case is the first way: by the U.S. or Florida Supreme Court declaring death to be unconstitutional as a form of criminal punishment. This argument fails not only for the reasons set forth in pages 10-12 of Appellant's Initial Brief, but also because there is nothing in Section 775.082(2) that suggests the Florida Legislature intended to deny resentencing to defendants whose death sentences are rendered unconstitutional as a result of the unconstitutionality of Florida's life-or-death sentencing mechanism.

The doctrine of *in pari materia* is a principle of statutory construction which requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent. Fla. Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 768 (Fla. 2005). Florida Statutes Section 775.082(2)'s general provision for commutation of unconstitutional death sentences to life, together with Section 775.082(2)'s single exception of death sentences rendered unconstitutional because of the method of execution leaves no room to "read in" another exception for death sentences

rendered unconstitutional as a result of the unconstitutionality of Florida's life-or-death sentencing mechanism.

Appellee argues at page 10 of its Answer Brief that Appellant failed to provide this Florida Supreme Court with reason to reconsider its Hurst v. State, 202 So. 3d 40 (Fla. 2016) and Franklin v State, 209 So.3d 1241 (Fla. 2016) decisions holding that Florida Statutes Section 775.082(2) resentencing-to-life provision applicable only if death is ruled unconstitutional as a form of criminal punishment. Appellant responds that the facts of the subject multiple-defendant, multiple-murder case provide this Florida Supreme Court with ample reason to reconsider such prior rulings.

In this case, three different Defendants were jointly tried for the killing of six different victims. Defendant Michael Salas received life sentences for all of the victims' deaths. However, as this Florida Supreme Court noted in Victorino v. State, 23 So. 3d 87 (Fla. 2009), Victorino received non-unanimous jury death recommendations (and subsequent death sentences) for the murder of Berlanger by a vote of 10 to 2, for the murder of Ayo-Roman by a vote of 10 to 2, for the murder of Gleason by a vote of 10 to 2, for victim Gonzala by a vote of 7 to 5. Victorino received jury life-sentence recommendations (and subsequent life sentences) for victims Nathan and Vega. Co-Defendant Hunter received non-unanimous jury death-sentence recommendations (and subsequent death sentences)

for the murder of victim Gleason by a vote of 10 to 2, for the murder of victim Gonzales by a vote of 9 to 3, for the murder of victim Nathan by a vote of 10 to 2, for the murder of victim Vega by a vote of 9 to 3. Hunter received life recommendations and subsequent life sentences for the murders of victim Berlanger and victim Ayo-Roman. Hunter v. State, 8 So. 3d 1052 (Fla. 2008).

Ordinarily, when a previously death-sentenced defendant is granted a new penalty phase, a comparatively perfunctory presentation of "guilt" evidence is included in order to familiarize the new jury with the mechanics of the killing and each individual defendant's relative culpability. However, in this case, the previous sentencing jury gave widely varying death recommendations for each defendant and for each victim. Of necessity, almost all of the guilt-phase evidence and testimony will have to be re-presented in the new penalty phase in order for the new sentencing jurors to again assess each defendant's individual culpability as to each individual victim. The expenditure of public resources will be enormous.

It is imminently reasonable to think that this is exactly the type of expense that the Florida Legislators sought to avoid in enacting Florida Statutes Section 775.082(2). The expense-avoidance intent and benefit of Section 775.082(2) is furthered especially well in this case, where the only other possible sentences are life without parole.

At page 11 of its Answer Brief, Appellee quoted that portion of this Florida Supreme Court's Hurst v. State, 202 So. 3d 40 (Fla. 2016) Opinion in which this court explained that Florida Statutes Section 775.082(2) is intended to provide a "fail safe" in the event that the death penalty, as a penalty, is declared categorically unconstitutional. The Florida Legislature's intent to create "fail safes" to avoid costly new criminal trials is also evident in Florida Statutes Section 924.34, where the Florida Legislature empowered the courts to reduce judgments and sentences for unsupported offenses to a judgments and sentences for supported, lesser-included offenses.

Both sides agree that Florida Statutes Section 775.082(2) is intended as a "fail safe." They simply disagree about the extent of such fail-safe. Appellant respectfully submits that, in all likelihood, the Legislators who passed Section 775.082(2), if still alive, would be surprised to learn that its automatic resentencing-to-life provision is not currently being applied to death sentences undone by the Hurst decisions.

Issue 2: Response and rebuttal to Appellee's argument that the trial court correctly denied Appellant's double jeopardy argument

With respect to Issue 2, Appellant shall stand on the argument he submitted in his Initial Brief.

Issue 3: Response and rebuttal to Appellee's argument that the trial court correctly ruled that *ex post facto* laws do not Prohibit Appellant from once again facing the death penalty...

With respect to Issue 3, Appellant shall stand on the argument he has submitted in his Initial Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 30, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court E-Filing Portal system which will send notice of electronic filing to Rosemary L. Calhoun, Assistant State Attorney, and to Arthur Christian Miller, Assistant Attorney State Attorney and Vivian Singleton, Assistant Attorney General.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Counsel for Appellant

EXHIBIT 7

all of the advisory recommendations in the case -- first we'll start with the case of the State of Florida vs. Troy Victorino, and I'll have the clerk read all the advisory verdicts and then you'll be polled, and instead of polling you by name, it's occurred to me that that gets your name broadcast, so what I'm going to do is poll you by number.

So if we could start in the corner, we'll start with juror number one. I think you know your numbers. Does everybody know their number? Okay. So you'll be asked juror number one and so on.

Madam Clerk, would you publish the advisory recommendations in the State of Florida vs. Troy Victorino.

THE CLERK: In the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, State of Florida vs. Troy Miguel Victorino, case number 2004-01378CFAWS, advisory recommendation regarding Erin Belanger, Count II of the indictment: A majority of the jury, by a vote of ten, advise and recommend to the Court that it impose the death penalty upon Troy Victorino. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Francisco Ayo-Roman, Count III of the indictment: A majority of the jury, by a vote of ten, advise and recommend to the Court that it impose the death penalty upon Troy Victorino. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Jonathan W. Gleason, Count IV of the indictment: A majority of the jury, by a vote of seven, advise and recommend to the Court that it impose the death penalty upon Troy Victorino. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Roberto Manuel Gonzalez, Count V of the indictment: A majority of the jury, by a vote of nine, advise and recommend to the Court that it impose the death penalty upon Troy Victorino. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Michelle Ann Nathan, Count VI of the indictment: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Troy Victorino

without possibility of parole. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Anthony Vega, Count VII of the indictment: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Troy Victorino without possibility of parole. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

THE COURT: Let me just pause for a minute. Madam Clerk, would you -- well, let me, first of all -- ladies and gentlemen of the jury, we're going to ask you individually concerning the advisory sentence. It is not necessary that you state how you personally voted, as I indicated to you earlier, or how any other person voted, but only if the advisory sentence as read was correctly stated. You're going to -- we're actually going to poll you by asking two questions. The first as to the first -- first as to Counts II, III, IV, and V, and then a second question as to Counts VI and VII.

Madam Clerk, would you poll the jury referring to their seat numbers.

THE CLERK: Do you, juror number one,

regarding Counts II, III, IV and V, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LEWIS: Yes.

THE CLERK: And do you also agree, as to Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LEWIS: Yes.

THE CLERK: Do you, juror number two, agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. ROSS: Yes.

THE CLERK: And do you also agree, regarding Count VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. ROSS: Yes.

THE CLERK: Do you, juror number three, agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the

clerk?

MS. BATES: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. BATES: Yes.

THE CLERK: Do you, juror number four, agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. HULL: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. HULL: Yes.

THE CLERK: Do you, juror number five, regarding Counts II, III, IV, and V, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. McCALL: Yes.

THE CLERK: And do you also agree, regarding

Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. McCALL: Yes.

THE CLERK: Juror number six, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. COPELAND: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. COPELAND: Yes.

THE CLERK: Juror number seven, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. MASTERS: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. MASTERS: Yes.

THE CLERK: Juror number eight, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. SPROWLES: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. SPROWLES: Yes.

THE CLERK: Juror number nine, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. WESTON: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. WESTON: Yes.

THE CLERK: Juror number ten, do you agree, regarding Counts II, III, IV, and V, and confirm

that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LEE: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LEE: Yes.

THE CLERK: Juror number 11, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. BERRY: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MR. BERRY: Yes.

THE CLERK: Juror number 12, do you agree, regarding Counts II, III, IV, and V, and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LAZERTE: Yes.

THE CLERK: And do you also agree, regarding Counts VI and VII, and confirm that at least six or more of the jury join in the advisory sentence that you have just heard read by the clerk?

MS. LAZERTE: Yes.

THE COURT: Thank you, Madam Clerk.

Madam Clerk, would you now publish the advisory recommendations that were made in the State of Florida vs. Jerone Hunter, case 04-1380.

THE CLERK: In the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, State of Florida vs. Jerone Hunter, case number 2004-01380CFAWS, advisory recommendation regarding Erin Belanger, Count II of the indictment: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Jerone Hunter, without possibility of parole. Dated this 1st day of August, 2006, St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Francisco Ayo-Roman, Count III of the indictment: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Jerone Hunter

without possibility of parole. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Jonathan W. Gleason, Count IV of the indictment: A majority of the jury, by a vote of ten, advise and recommend to the Court that it impose the death penalty upon Jerone Hunter. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Roberto Manuel Gonzalez, Count V of the indictment: A majority of the jury, by a vote of nine, advise and recommend to the Court that it impose the death penalty upon Jerone Hunter. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Michelle Ann Nathan, Count VI of the indictment: A majority of the jury, by a vote of ten, advise and recommend to the Court that it impose the death penalty upon Jerone Hunter. Dated this 1st day of August, 2006, in St. Augustine, St. Johns County, Florida, Warner Copeland, foreperson.

Advisory recommendation regarding Anthony

EXHIBIT 8

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 2004-001378-CFAWS

v.

TROY VICTORINO,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

This matter came before the Court for a case management conference and oral argument on the "Defendant's Successive Motion for Postconviction Relief and for Correction of Illegal Sentences," filed on December 28, 2016. The Court, having considered the motion along with the State's response, having heard argument of counsel and reviewed the pertinent case law, and being fully advised in the premises, hereby finds as follows:

PROCEDURAL HISTORY

On July 25, 2006, after a jury trial, the Defendant was found guilty of the following crimes: one count of conspiracy to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence (count 1); six counts of first-degree murder of victims Erin Belanger, Francisco Ayo Roman, Jonathon W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts 2 to 7); one count of abuse of a dead human body with a weapon (count 8); one count of armed burglary of a dwelling (count 13); and one count of cruelty to animals (count 14). After the penalty phase the jury returned a recommendation that the Defendant be sentenced to death for the murders of Erin Belanger (by a vote of 10-2), Francisco Ayo Roman (by a vote of 10-2), Jonathon W. Gleason (by a vote of 7-5),

and Roberto Manuel Gonzalez (by a vote of 9-3), and to life imprisonment without possibility of parole for the murders of Michelle Ann Nathan and Anthony Vega.

On September 21, 2006, the trial court, following the jury recommendation, imposed four death sentences on the Defendant. The trial court found six aggravating factors and accorded them the following weight: (1) the Defendant was previously convicted of a felony and was on felony probation at the time of the murders (moderate weight); (2) the Defendant was convicted of six contemporaneous first-degree capital murders (very substantial weight); (3) the Defendant committed the murders in the course of a burglary (moderate weight); (4) the Defendant committed the murders of Jonathon Gleason and Roberto Manuel Gonzalez to avoid arrest (substantial weight); (5) the murders were especially heinous, atrocious or cruel (very substantial weight); and (6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight). The trial court found no statutory mitigating factors, but found the following non-statutory mitigating factors with appropriate weight assigned: (1) the Defendant has a history of mental illness, brain abnormality and hospitalizations (some weight); (2) the Defendant was physically, sexually and emotionally abused as a child (moderate weight); (3) the Defendant is a devoted son, brother, uncle and friend and has the support of family and friends (little weight); (4) the Defendant took a homeless person in off the streets, fixed a friend's car and boat, and mediated a fight as acts of kindness (very little weight); (5) the Defendant exhibited good behavior during trial (very little weight); (6) the defendant was a good inmate while incarcerated (very little weight); (7) the defendant was a good student (little weight); (8) the Defendant had an alcohol abuse problem (very little weight); and (9) the Defendant had a useful occupation (very little weight). The trial

court determined that the aggravating factors far outweighed the mitigating circumstances and, agreeing with the jury's recommendation, sentenced the Defendant to death.

On November 25, 2009, after the Defendant's direct appeal, the Supreme Court of Florida issued an order affirming the Defendant's convictions and sentences of death. On January 3, 2012, following an evidentiary hearing, the trial court denied the Defendant's amended Rule 3.851 postconviction motion. On October 10, 2013, the Supreme Court of Florida issued an order affirming the denial of the Defendant's Rule 3.851 motion. On December 28, 2016, the Defendant filed the instant successive Rule 3.851 postconviction motion alleging four claims.

ANALYSIS

Claim 1: *Hurst v. Florida; Hurst v. State*

The Defendant files his successive postconviction motion due to a "change in the law" following the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). After repeatedly upholding Florida's capital sentencing statute over the past quarter of a century, the United States Supreme Court reversed course and held, for the first time, in *Hurst v. Florida* that Florida's capital sentencing scheme was an unconstitutional violation of the Sixth Amendment right to a jury trial because it failed to require a jury, rather than a judge, to make the necessary findings of fact to impose the death sentence. The jury's advisory recommendation for death was deemed "not enough." *Id.* at 624. In so ruling, the United States Supreme Court overruled its own previous decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), to the extent that they approved Florida's sentencing scheme in which the judge, independent of the jury's fact-finding, finds the facts necessary for imposition of the death penalty. *Id.*

On remand of *Hurst*, the Supreme Court of Florida held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57. Further, in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), the Supreme Court of Florida concluded that the *Hurst* rulings apply retroactively to all defendants whose sentences were not yet final when the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 585 (2002).

In the last eight months since its *Hurst* ruling, in every opinion involving a case where *Hurst* was retroactively applicable and the jury did not return a unanimous recommendation of death, the Supreme Court of Florida has held that the *Hurst* error was not harmless error. As a result, to date at least 41 death row inmates have had their death sentences vacated and a new penalty phase trial ordered by the Supreme Court. *See Okafor v. State,* SC15-2136 (Fla. June 8, 2017) (*Hurst* error not harmless where the jury vote for the death penalty was 11-1); *Hertz v. Jones*, 42 Fla. L. Weekly S599 (Fla. May 18, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Hernandez v. Jones*, 42 Fla. L. Weekly S553 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was not unanimous); *Caylor v. State*, SC15-1823, 2017 WL 2210386 (Fla. May 18, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Pasha v. State*, SC13-1551, 2017 WL 1954975 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 11-1 and 11-1); *Snelgrove v. State*, SC15-1659, 2017 WL 1954978 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 8-4 and 8-4); *Davis v. State*, SC15-1794, 2017 WL 1954979 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 9-3

and 10-2); *Serrano v. State*, SC15-258, 2017 WL 1954980 (Fla. May 11, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Hampton v. State*, SC15-1360, 2017 WL 1739237 (Fla. May 4, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Card v. Jones*, SC17-453, 2017 WL 1743835 (Fla. May 4, 2017) (*Hurst* error not harmless where the jury vote was 11-1); *Altersberger v. State*, SC15-628, 2017 WL 1506855 (Fla. April 27, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Brookins v. State*, SC14-418, 2017 WL 1409664 (Fla. April 20, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Banks v. State*, SC14-979, 2017 WL 1409666 (Fla. April 20, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *McMillian v. State*, SC14-1796, 2017 WL 1366120 (Fla. April 13, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Robards v. State*, SC15-1364, 2017 WL 1282109 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 7-5 and 7-5); *Guzman v. State*, SC13-1002, 2017 WL 1282099 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 7-5); *Heyne v. State*, SC14-1800, 2017 WL 1282104 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Abdool v. State*, SC14-582, 2017 WL 1282105 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Newberry v. State*, SC14-703, 2017 WL 1282108 (Fla. April 6, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *White v. State*, SC15-625, 2017 WL 1177640 (Fla. March 30, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Orme v. State*, SC13-819, 2017 WL 1201781 (Fla. March 30, 2017) (*Hurst* error not harmless where the jury vote was 11-1); *Bradley v. State*, SC14-1412, 2017 WL 1177618 (Fla. March 30, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Jackson v. State*, SC13-1232, 2017 WL 1090546 (Fla. March 23, 2017) (*Hurst* error not harmless where the jury vote was 11-1); *Baker v. State*, SC13-2331, 2017 WL 1090559 (Fla. March 23, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Deviney v. State*, SC15-1903, 2017 WL

1090560 (Fla. March 23, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Hodges v. State*, SC14-878, 2017 WL 1024527 (Fla. March 16, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Smith v. State*, SC12-2466, 2017 WL 1023710 (Fla. March 16, 2017) (*Hurst* error not harmless with jury votes of 10-2 and 9-3); *Ault v. State*, SC14-1551, 2017 WL 930926 (Fla. March 9, 2017) (*Hurst* error not harmless where the jury vote was 9-3 and 10-2); *Anderson v. State*, SC12-1252, 2017 WL 930924 (Fla. March 9, 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Durousseau v. State*, 42 Fla. L. Weekly S124 (January 31, 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Hojan v. State*, 42 Fla. L. Weekly S117 (January 31, 2017) (*Hurst* error not harmless in a case with 9-3 votes for both murder convictions); *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (*Hurst* error not harmless in a case with 7-5 votes for each of the five murder convictions); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Armstrong v. State*, 42 Fla. L. Weekly S15 (January 19, 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3, and where the jury completed a special verdict form indicating unanimous votes for four aggravating circumstances); *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 9-3); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* error not harmless in a case with 11-1 votes for each of the three murder

convictions); and *Mosley*, 209 So. 3d at 1248 (*Hurst* error not harmless where the jury vote was 8-4).

Because they are required to follow the Supreme Court's binding precedential authority, trial courts all around this state (including courts in the Seventh Judicial Circuit) are now vacating death sentences and ordering new penalty phase trials based on *Hurst* issues raised in postconviction motions. Such is the case with the instant Defendant's motion. In Claim 1 of his motion, the Defendant correctly argues that he was sentenced to death under a death sentencing statute that has now been declared unconstitutional, and that his existing death sentences must be vacated because their unconstitutionality and illegality have been established in the two *Hurst* decisions. The State concedes that the *Hurst* rulings apply retroactively to the Defendant because his death sentences became final after the *Ring v. Arizona* decision in 2002.

Based on the controlling authority of the Supreme Court, this Court must find that the Defendant's death sentences are rendered unconstitutional by the *Hurst* decisions and that the *Hurst* rulings apply to the Defendant because his death sentences became final after the 2002 *Ring* decision. Furthermore, given that the jury's death sentence recommendations for the Defendant were not unanimous, the Court finds that the State has not met, and cannot meet, its burden of establishing that the *Hurst* error in this case is harmless beyond a reasonable doubt. Therefore, this Court is left with absolutely no choice but to grant the Defendant the relief he seeks in Claim 1 of his motion.

Claim 2: Automatic Resentencing to Life

In the second claim of his motion the Defendant alleges that he is entitled to have his present death sentences reduced to life sentences. The Defendant alleges that Florida Statutes,

Section 775.082, requires an automatic resentencing to life imprisonment when a death penalty sentence for a capital felony is held to be unconstitutional.

The Florida Supreme Court has held that the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not declare the death penalty unconstitutional, but rather decided the case based on the violation of a defendant's Sixth Amendment right to a jury trial. *Hurst v. State*, 202 So. 3d at 66. The Court held that because the death penalty is not unconstitutional, Section 775.082(2) does not require commutation to life under the holding of *Hurst v. Florida*. *Id.*; *see also Franklin v. State*, 209 So. 3d at 1248. Thus, the Defendant is not entitled to have his present death sentences automatically converted to life sentences under Section 775.082(2). Accordingly, Claim 2 should be summarily denied.

Claim 3: Double Jeopardy

In his third claim the Defendant alleges that he cannot be put at risk of receiving the death penalty again because this will be in violation of the prohibition against double jeopardy contained in the United States and Florida Constitutions.

"In the context of capital proceedings, the constitutional protection against double jeopardy provides that if a defendant has been in effect 'acquitted' of the death sentence, the defendant may not again be subjected to the death penalty for that offense if retried or resentenced for any reason." *Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991). Here, the jury returned a recommendation that the Defendant be sentenced to death. Thus, the Defendant has not been "acquitted" of the death sentence and the constitutional protection against double jeopardy does not apply to him. Accordingly, Claim 3 also should be summarily denied.

Claim 4: Ex Post Facto Laws

The Defendant alleges in his fourth claim that he cannot be put at risk of receiving the death penalty again because of the prohibitions against ex post facto laws contained in the United States and Florida Constitutions.

The application of the new capital sentencing statutes did not constitute an ex post facto violation because it is merely a procedural change and does not alter the punishment attached to first-degree murder. *State v. Perry*, 192 So. 3d 70, 75 (Fla. 5th DCA 2016), *review granted*, SC16-547, 2016 WL 1399241 (Fla. April 6, 2016), and *certified question answered*, 41 Fla. L. Weekly S449 (Fla. Oct. 14, 2016). Thus, Claim 4 must be denied.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Pursuant to the Supreme Court of Florida's mandates in *Hurst* and its progeny, the "Defendant's Successive Motion for Postconviction Relief and for Correction of Illegal Sentences" is granted as to Claim 1. The Defendant's sentences of death (on counts 2, 3, 4, and 5) are vacated. The Defendant's sentences on the other counts are not affected by this ruling and remain unchanged. This case shall be returned to this Court's docket for a new penalty phase proceeding on the affected counts, and a case management conference will be set by separate order.

2. Claims 2, 3, and 4 of the Defendant's motion are denied.

DONE AND ORDERED in DeLand, Volusia County, Florida, this 14th day of June, 2017.

RANDELL H. ROWE, III
CIRCUIT JUDGE

Copies to:

Christopher J. Anderson, Esq., Counsel for Defendant
Vivian Singleton, Assistant Attorney General
Rosemary L. Calhoun, Assistant State Attorney